

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
vs.
ALLEN RAY JORDAN,
Movant.

No. 2:96-cr-475-KJM-EFB-P

FINDINGS AND RECOMMENDATIONS

Movant Allen Ray Jordan is a federal prisoner proceeding pro se with a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.¹ Jordan challenges his sentence of 360 months in prison on charges of conspiring to manufacture methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1); attempting to manufacture methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1); and maintaining a place for manufacturing methamphetamine, in violation of 21 U.S.C. § 856. He seeks post-conviction relief on the grounds that his sentence allegedly was imposed in violation of his Sixth Amendment right to trial by jury. Upon careful consideration of the record and the applicable law, the court recommends that Jordan's § 2255 motion be denied.

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¹ This motion was assigned, for statistical purposes, the following civil case number: No. 2:14-cv-1280-KJM-EFB.

1 **I. Procedural Background**

2 On October 1, 1998, a jury convicted Jordan of one count of conspiring to manufacture
3 methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1) (Count One); one count of
4 attempting to manufacture methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1) (Count
5 Two); and one count of maintaining a place for manufacturing methamphetamine, in violation of
6 21 U.S.C. § 856 (Count Three). *United States v. Jordan*, 291 F.3d 1091, 1093 (9th Cir. 2002).
7 Prior to his sentencing proceedings, Jordan filed written objections to the presentence report, in
8 which he argued that pursuant to *Jones v. United States*, 526 U.S. 227 (1999), the government
9 must allege in the indictment and prove to a jury beyond a reasonable doubt that the drug quantity
10 attributable to Jordan was greater than fifty grams in order to make him eligible for the maximum
11 sentence of life imprisonment. *Id.* at 1094. The district court rejected this argument and
12 sentenced Jordan to concurrent terms of life imprisonment on Counts One and Two and twenty
13 years imprisonment on Count Three. *Id.*, ECF No. 277.

14 Jordan filed an appeal of his sentence. ECF No. 282. Among other claims, he argued
15 that:

16 the district court erred by sentencing him under 21 U.S.C. §
17 841(b)(1)(A)(viii), for a crime involving more than 50 grams of
methamphetamine, because drug quantity was not charged in the
18 indictment. Jordan claims he should be resentenced under 21
U.S.C. § 841(b)(1)(C), for a crime involving an indeterminate
19 amount of drugs, with a maximum sentence of 20 years for each
count, rather than the maximum sentence of life imprisonment
20 under § 841(b)(1) (A)(viii).

21 *Jordan*, 291 F.3d at 1094. While Jordan's appeal was pending, the United States Supreme Court
22 decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Relying on *Apprendi*, the Ninth Circuit
23 remanded the matter to the district court for resentencing. Specifically, the court held:

24 Drug quantity was neither charged in the indictment, nor submitted
25 to the jury and proved beyond a reasonable doubt. The district
court therefore erred when it sentenced Jordan above the default
26 maximum sentence for a crime involving an indeterminate quantity
(twenty years per count), sentencing him instead to the maximum
27 sentence for a crime involving 50 grams or more of
methamphetamine (life imprisonment).

28 *Id.* at 1095.

1 On remand, the district court resentenced Jordan to 240 months on Count One, 60 months
2 on Count Two, and 60 months on Count Three, to be served consecutively, for a total sentence of
3 360 months in prison. ECF No. 329. Jordan filed an appeal of this sentence, raising the
4 following claims: (1) it was a violation of the *Apprendi* decision for the district court to sentence
5 him “to a term of imprisonment exceeding the statutory maximum for each count because drug
6 quantity was not charged and proved to a jury;” (2) the district court erred in imposing his
7 sentence consecutively; and (3) the holding of *United States v. Palafox*, 764 F.2d 558 (9th Cir.
8 1985) barred the imposition of consecutive sentences in this case. *United States v. Jordan*, 88 F.
9 App’x. 247, at *1 (9th Cir. 2004). The Court of Appeals rejected Jordan’s arguments and
10 affirmed his sentence of 360 months in prison. *Id.*

11 Jordan then filed a petition for certiorari in the United States Supreme Court. While the
12 petition for certiorari was pending, the Supreme Court decided *United States v. Booker*, 543 U.S.
13 220 (2005). The Supreme Court granted certiorari and remanded the matter to the Ninth Circuit
14 for further consideration in light of *Booker*. *Jordan v. United States*, 543 U.S. 1003 (2005). The
15 Ninth Circuit then remanded the case to the district court with the same instructions. *United*
16 *States v. Jordan*, 120 F. App’x. 205 (2005). Upon remand, the district court sentenced Jordan to
17 the same 360 month sentence that it had earlier imposed. ECF No. 381. In doing so, the court
18 found by clear and convincing evidence that Jordan’s methamphetamine laboratory was capable
19 of manufacturing at least 3 kilograms of methamphetamine. *Id.*

20 Jordan again appealed his sentence after remand. ECF No. 386. By order effective
21 October 16, 2008, the Ninth Circuit affirmed Jordan’s sentence, concluding that the district
22 court’s finding regarding the capacity of the methamphetamine laboratory was “well supported”
23 by the trial record and was appropriate for purposes of setting Jordan’s offense level. *United*
24 *States v. Jordan*, 273 F. App’x. 690 (2008). *Id.* The appellate court also found that Jordan was
25 not entitled to an evidentiary hearing in order to rebut the drug quantity computations in the
26 presentence report or in the district court’s sentencing order, that no error occurred under *In re*
27 *Winship*, 397 U.S. 358, 363-64 (2006), and that it was not unreasonable for the district court to
28 impose consecutive sentences. *Id.*

1 Jordan filed the instant § 2255 motion more than five years later, on May 23, 2014. The
2 government filed a response on November 20, 2014, and Jordan filed a reply on January 20,
3 2015.²

4 **II. Applicable Law**

5 A federal prisoner making a collateral attack against the validity of his or her conviction
6 or sentence must do so by way of a motion to vacate, set aside or correct the sentence pursuant to
7 28 U.S.C. § 2255, filed in the court which imposed sentence. *Tripati v. Henman*, 843 F.2d 1160,
8 1162 (9th Cir. 1988). Under § 2255, the federal sentencing court may grant relief if it concludes
9 that a prisoner in custody was sentenced in violation of the Constitution or laws of the United
10 States. *United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999). To warrant relief, a
11 petitioner must demonstrate the existence of an error of constitutional magnitude which had a
12 substantial and injurious effect or influence on the guilty plea or the jury's verdict. *Brech v.*
13 *Abrahamson*, 507 U.S. 619, 637 (1993). Relief is warranted only where a petitioner has shown “a
14 fundamental defect which inherently results in a complete miscarriage of justice.” *Davis v.*
15 *United States*, 417 U.S. 333, 346 (1974).

16 Under § 2255, “a district court must grant a hearing to determine the validity of a petition
17 brought under that section, ‘[u]nless the motions and the files and records of the case conclusively
18 show that the prisoner is entitled to no relief.’” *United States v. Blaylock*, 20 F.3d 1458, 1465
19 (9th Cir. 1994) (alteration in original) (quoting 28 U.S.C. § 2255). The court may deny a hearing
20 if the movant’s allegations, viewed against the record, fail to state a claim for relief or “are so
21 palpably incredible or patently frivolous as to warrant summary dismissal.” *United States v.*
22 *McMullen*, 98 F.3d 1155, 1159 (9th Cir. 1996) (internal quotation marks omitted). To warrant a
23 hearing, therefore, the movant must make specific factual allegations which, if true, would entitle
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26 ² Jordan requests that the government’s response be stricken from the record because it
27 was not served on Jordan and was unresponsive to his arguments. ECF No. 411 at 2-4. The
28 record reflects that Jordan received a copy of the government’s response prior to the filing of his
traverse. The court does not find good cause to strike the government’s response and has
reviewed all of the pertinent filings in this matter.

1 him to relief. *Id.* Mere conclusory assertions in a § 2255 motion are insufficient, without more,
2 to require a hearing. *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir.1980).

3 **III. Jordan's Claims**

4 Jordan raises two claims for federal habeas relief based on the United States Supreme
5 Court decision in *Alleyne v. United States*, ____ U.S. ___, 133 S.Ct. 2151 (2013). First, Jordan
6 argues that the district court violated his Sixth Amendment right to a jury trial when it made a
7 finding regarding the lab capacity of the methamphetamine lab in order to increase his sentence
8 beyond the statutory minimum sentence for his crime. ECF No. 397 at 4. Specifically, he claims:

9 It is undisputed that the drug quantity that enhanced Jordan's
10 mandatory minimum sentence was neither charged in the
11 indictment, nor found beyond a reasonable doubt by the jury. The
12 drug quantity finding in Jordan's sentencing was as a consequence
13 of judicial fact finding by a preponderance of the evidence, and it
14 was that drug quantity fact finding that caused the minimum
15 sentence to be increased above the mandatory minimum sentence
16 allowed by law.
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18 The reality of Jordan's case is that the sentence imposed was
19 constitutionally impermissible, if imposed today, because the
sentence resulted from judicial fact finding by a preponderance of
the evidence, and that fact finding increased Jordan's statutory
mandatory minimum sentence, and that increase in the statutory
mandatory minimum sentence violated the Sixth Amendment.

20 *Id.* at 15, 16. In his second claim for relief, Jordan argues that *Alleyne* applies retroactively to this
21 case. *Id.* at 5.

22 In *Alleyne*, the United States Supreme Court overruled *Harris v. United States*, 536 U.S.
23 545 (2002), and held that any fact that increases the mandatory minimum sentence for a crime is
24 an element of the offense that must be charged in the indictment, submitted to the jury and found
25 beyond a reasonable doubt. *Alleyne*, 133 S.Ct. 2151. Assuming arguendo that the holding in
26 *Alleyne* applies to this case, the decision does not provide Jordan with a basis for relief because it
27 is not retroactively applicable to cases on collateral review. The Ninth Circuit, as well as every
28 other Circuit court to have considered this issue, has concluded that *Alleyne* does not apply
retroactively to cases that became final before that decision was announced. See *Hughes v.*
United States, 770 F.3d 814, 818-19 (9th Cir. 2014); *In re Mazzio*, 756 F.3d 487, 491 (9th Cir.

1 2014); *see also United States v. Reyes*, 755 F.3d 210, 212 (3d Cir. 2014); *In re Kemper*, 735 F.3d
2 211, 212 (5th Cir. 2013); *United States v. Redd*, 735 F.3d 88, 91–92 (2d Cir. 2013); *In re Payne*,
3 733 F.3d 1027, 1029–30 (10th Cir. 2013); *Simpson v. United States*, 721 F.3d 875, 876 (7th Cir.
4 2013); *Chester v. Warden*, No. 12-15119, 552 Fed. Appx. 887, 891 (11th Cir. 2014); *United*
5 *States v. Stewart*, 540 F. App'x. 171, 2013 WL 5397401, at *1 n.1 (4th Cir. Sept. 27, 2013);
6 *Broussard v. United States*, No. 1:03-CR-05054, 2014 WL 3530003, at *4 (E.D. Cal. July 15,
7 2014) (noting that district courts in the Ninth Circuit have “uniformly” concluded that the
8 decision in *Alleyne* is not retroactive, and citing cases).

9 Jordan’s motion is also untimely. Title 28 U.S.C. § 2255(f) establishes a one year
10 limitations period for motions filed under § 2255. In relevant part, the one-year limitations period
11 runs from “the date on which the judgment of conviction becomes final,” (§ 2255(f)(1)), or “the
12 date on which the right asserted was initially recognized by the Supreme Court, if that right has
13 been newly recognized by the Supreme Court and made retroactively applicable to cases on
14 collateral review.” 28 U.S.C. § 2255(f)(3). Jordan argues that the instant motion is timely based
15 on 28 U.S.C. § 2255(f)(3). ECF No. 397 at 10, 12; ECF No. 411 at 4-5, 10-13. However, Section
16 2255(f)(3) is not applicable in this case because the United States Supreme Court did not
17 explicitly make the decision in *Alleyne* retroactively applicable to cases on collateral review and
18 subsequent Circuit Court decisions have clarified that *Alleyne* is not retroactive. *Dodd v. United*
19 *States*, 545 U.S. 353, 357-58 (2005). *Alleyne* did not create a newly recognized right to be
20 applied retroactively. Accordingly, the statute of limitations for Jordan’s § 2255 motion began to
21 run on the date on which Jordan’s judgment of conviction became final.

22 Jordan’s conviction became final 90 days after the October 16, 2008 judgment issued by
23 the U.S. Court of Appeals for the Ninth Circuit, when the time for filing a petition for certiorari
24 elapsed. *See United States Supreme Court Rule 13.1; Griffith v. Kentucky*, 479 U.S. 314, 321 n.6
25 (1987) (a case is final when “a judgment of conviction has been rendered, the availability of
26 appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari
27 finally denied”). The one year statute of limitations expired one year after that date, on
28 ////

1 approximately January 16, 2010. Jordan's motion, which was filed on May 23, 2014, is therefore
2 untimely and should be denied on that basis as well.³

3 **IV. Conclusion**

4 Accordingly, for the foregoing reasons, IT IS HEREBY RECOMMENDED that:

- 5 1. Movant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C.
6 § 2255 be denied; and
7 2. The Clerk be directed to close the companion civil case, No. 2:14-cv-1280-KJM-EFB.

8 These findings and recommendations are submitted to the United States District Judge
9 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
10 after being served with these findings and recommendations, any party may file written
11 objections with the court and serve a copy on all parties. Such a document should be captioned
12 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
13 shall be served and filed within fourteen days after service of the objections. Failure to file
14 objections within the specified time may waive the right to appeal the District Court's order.
15 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.
16 1991). In his objections petitioner may address whether a certificate of appealability should issue
17 in the event he files an appeal of the judgment in this case. See Rule 11, Rules Governing Section
18 2255 Cases (the district court must issue or deny a certificate of appealability when it enters a
19 final order adverse to the applicant).

20 DATED: December 12, 2016.

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22 EDMUND F. BRENNAN
23 UNITED STATES MAGISTRATE JUDGE
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³ Jordan has made no showing that he is entitled to equitable tolling of the applicable
statute of limitations.